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Evidence -- Expert Medical Testimony on Causation

William H. Cannon

> hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.[39]

Not only do some writers disagree with this approach,[40] but all courts have not been in accord.[41] Both the majority and the dissent in *Davis* contributed to the deterioration of this concept of trustworthiness. Although the majority held the above principle binding in *Davis*, they recognized that a confession arising from religious influence, whether prompted by a layman or a clergyman, may be subject to exclusion.[42] Though dealing with the prayer only secondarily (sensing in it a diversion), the dissent implied that such action by police has no place in an accusatorial system and that the "psuedo [*sic*] religious ministrations of a policeman" when a minis ter is readily available clearly cannot withstand the objective test.[43] The Supreme Court has never been faced with the issue. But use of religious adjurations to induce a confession would be hard pressed in withstanding the objective test as applied by the Court.

RALPH MALLOY MCKEITHEN

Evidence—Expert Medical Testimony on Causation

In *Lockwood v. McCaskill*[1] the North Carolina Supreme Court seemingly added another dimension to the *could*-or-*might* rule of admissibility of expert testimony as established in *Summerlin v. Carolina & Northwestern R.R.*[2] It has been an accepted rule in

[39] JOY, CONFESSIONS 51-52 (1842).

[40] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1963); Note, 1 WASHBURN L. REV. 415 (1961). The latter is the most complete analysis available regarding the clergyman and coerced confessions. *Cf.* REIK, THE COMPULSION TO CONFESS (1959).

[41] *E.g.*, Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); Denmark v. State, 95 Fla. 757, 116 So. 757 (1928); Johnson v. State, 107 Miss. 196, 65 So. 218 (1914). Forty-four of the states now have a statute making privileged any communications between a member of the clergy and a confessant. These statutes are collected in Professor Reese's article. Reese, *supra* note 40, at 61 n.22.

[42] 339 F.2d at 776.

[43] 339 F.2d at 784-85.

[1] 262 N.C. 663, 138 S.E.2d 541 (1964).

[2] 133 N.C. 550, 45 S.E. 898 (1903).

> It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car, and not by a fall from any other elevated place, or in any other way that might just as well have pro-

this state that it is the safer practice when an expert is to testify as to cause and effect that he must testify that in his opinion the occurrence *could* or *might* have caused the injury or death, and not that it *did* cause, or *was* the cause of the injury.[3] The rationale is that positive opinion testimony on the issue of causation is an opinion as to the ultimate fact upon which the jury must decide and is an invasion of the province of the jury.[4]

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duced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts.

Id. at 555-56, 45 S.E. at 900. A careful reading of this case would seem to indicate that it does not establish the *could*-or-*might* rule as firmly as later cases seem to indicate.

[3] In STANSBURY, NORTH CAROLINA EVIDENCE § 137 (2d ed. 1963) [hereinafter cited as STANSBURY], the author says:

> If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such a result. A question in the latter form has been thought to be objectionable as invading the province of the jury, although the real objection would seem to be that it unwarrantedly excludes the possibility of some other cause not referred to in the hypothetical statement. In any event the rule is a technical one, and in several cases the Court has avoided its application by drawing narrow distinctions or by finding that error in admission was harmless, but a rigid observance is the only safe course for counsel to follow.

Id. at 332-33. Although the rule is recognized by Stansbury and decisions subsequent to *Summerlin* [see, *e.g.*, Stathopoulos v. Shook, 251 N.C. 33, 110 S.E.2d 452 (1959) (recognized the rule but held improper response to be non-prejudicial error); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942) ("I know the accident did it" held error); J. M. Pace Mule Co. v. Seaboard Air Line Ry., 160 N.C. 252, 75 S.E. 994 (1912) ("mule was jammed up in the car" held error)], there are more exceptions than cases that follow the rule. See, *e.g.*, Hargett v. Jefferson Standard Life Ins. Co., 258 N.C. 10, 128 S.E.2d 26 (1962) ("death resulted from insect sting" was not considered by the court in relation to the rule); Stathopoulos v. Shook, *supra;* Dempster v. Fite, 203 N.C. 697, 167 S.E. 33 (1932) ("the accident caused the injury" held not prejudicial error); Martin v. P. H. Hanes Knitting Co., 189 N.C. 644, 127 S.E. 688 (1925) (testimony as to what caused death was not invasion of province of the jury); Lynch v. Rosemary Mfg. Co., 167 N.C. 98, 83 S.E. 6 (1914) ("was cause of death" not error); Parrish v. High Point, Randleman, Ashboro & Southern Ry., 146 N.C. 125, 59 S.E. 348 (1907) ("the kidney was dislocated by the fall" held proper response to a properly framed hypothetical question). *Parrish* indicates the major withdrawal from a strict application of the *Summerlin* rule, and it appears that except for Patrick v. Treadwell, *supra,* the rule gets no more than lip service from the court. The vitality of the rule appears to come from Stansbury's warning and the tendency of attorneys to take the safe approach. The court is loathe to hold a violation of the rule to be reversible error, yet it has not specifically overruled it.

[4] See Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942); J. M. Pace Mule Co. v. Seaboard Air Line Ry., 160 N.C. 252, 75 S.E. 994 (1912); Summerlin v. Carolina & Northwestern R.R., 133 N.C. 550, 45 S.E. 898 (1903); STANSBURY §§ 126, 135.

In *Lockwood* the plaintiff was injured in an automobile collision with the defendant. Negligence was admitted. There was no denial that the plaintiff sustained injuries to his hip and neck and had suffered severe headaches as a result. The controversy was whether the causation between the accident and an attack of amnesia three months after the accident was established. A jury verdict for 5,000 dollars was affirmed on appeal.[5]

The direct testimony on the matter of causation indicated that after the accident the plaintiff suffered various pains and severe headaches and that he worried about the effect of his absence from his service station, thereby losing sleep. During his absence, one of his employees damaged a customer's automobile, and the plaintiff had to pay 1,200 dollars damages. Several days after he returned to work, he had a severe headache which was followed by the amnesia. He was hospitalized and put under the care of a psychiatrist. It was the psychiatrist's expert testimony that was in question. After qualifying as an expert, he testified in response to a hypothetical question, which the court found acceptable, that, "it [the accident] may have had an influence on his condition."[6] He further testified:

> I feel like there were other contributing factors. . . . basically this man is an insecure person. He is a perfectionist. They worry more—a worrisome individual. The accident was a threat to his security, as well as the precipitating one is the loss of the automobile some several days before at which time his security was threatened and this is a factor. These are precipitating factors in an insecure indevidual.[7]

On cross-examination he stated:

> This employee's . . . wrecking a car, . . . that financial burden, yes, seems to be one of the factors. I thought that was the precipitating factor. He . . . had an insecure feeling which, of course, existed long before this accident. . . . If he had been a normal person, this collision which resulted in some back pain, would not have brought on amnesia.[8]

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[5] Several interesting issues are raised by this case. The issue of proximate cause is discussed in Byrd and Dobbs, *Torts, Survey of N.C. Case Law,* 43 N.C.L. REV. 906 (1965); Note, 43 N.C.L. REV. 1011 (1965). Sufficiency of the evidence to prove a prima facie case where expert medical testimony is involved is discussed in Annot., 135 A.L.R. 516 (1941). See also 20 AM. JUR. *Evidence* §§ 795, 862, 863 (1939).

[6] 262 N.C. at 666, 138 S.E.2d at 543.

[7] *Ibid.*

[8] *Ibid.*

On objection to the admission of the psychiatrist's testimony as being insufficient to support a judgment and therefore inadmissible,[9] the court said that the testimony *taken as a whole* indicated a *reasonable scientific probability* that the plaintiff's amnesia was produced as a direct result of the injuries suffered in the accident.[10] However, of the psychiatrist's testimony that "it may have had an influence on his condition,"[11] the court said: "This statement, considered alone, does not indicate a *reasonable scientific probability* that the attack of amnesia resulted from plaintiff's physical injuries. In this view of the matter the evidence is not admissible."[12] Herein lies the significance of the case as it relates to rules of admissibility of evidence.

It appears that the court is imposing rules of sufficiency on rules of admissibility.[13] It is submitted that the evidence was clearly admissible as expert testimony, and the proper consideration of the court should have been to support a finding of the fact of causation by the jury. Instead, the court seems to have created a new restriction on admissibility of expert testimony.[14]

I. Sufficiency and Admissibility

The great weight of authority indicates that expert opinion evidence framed in terms of *could* or *might* is admissible.[15] North

[9] Part of the purpose of this note is to indicate that the fact that expert testimony is in itself insufficient to support a judgment for the proponent should not make that testimony inadmissible.

[10] 262 N.C. at 669-70, 138 S.E.2d at 546.

[11] *Id.* at 666, 138 S.E.2d at 543.

[12] *Id.* at 669, 138 S.E.2d at 546. (Emphasis added.)

[13] "The 'could' or 'might' as used by Stansbury refers to probability and not mere possibility." 262 N.C. at 668, 138 S.E.2d at 545. "If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish prima facie the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted, and, if admitted, should be stricken." *Id.* at 669, 138 S.E.2d at 545-46. These indicate that the court was talking in terms of admissibility, and was defining the *could*-or-*might* rule, which is clearly a rule of admissibility. See Stansbury § 137.

[14] This restriction may be stated that expert medical testimony must not only conform to the *could*-or-*might* rule to be admissible, but must also indicate a reasonable probability of the causal relationship. It is not known whether the judge may consider other prior testimony, or whether he must look only to the testimony given by the expert in making his ruling.

[15] *E.g.*, Birmingham Electric Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343 (1948) ("probably due"); Ketcham v. Thomas, 283 S.W.2d 642 (Mo. 1955) ("could"); Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314 (Mo.

Carolina has followed this rule in recent cases.[16] It does not seem that the question of reasonable probability has arisen in relation to admissibility. The general rule indicated by the court has been applied in relation to sufficiency.[17] Whether or not the evidence is in itself sufficient to support a finding of causation by the jury should not determine the admissibility of the evidence offered. The West Virginia court has held that it "was not error to permit . . . [a doctor] to testify as to the 'possible' causal relationship between the plaintiff's condition at the time he treated her and the alleged drinking of a coca-cola with particles of glass in it, but that evidence, standing alone, was not sufficient to establish such a relationship."[18]

It is necessary that there be some form of reasonable probability rule. It is accepted that there is some minimum standard of sufficiency when expert testimony is used, and this is defined in different

App. 1945) ("might be attributable"); Oklahoma Natural Gas Co. v. Kelly, 194 Okla. 646, 153 P.2d 1010 (1944) ("could"). See Annot., 66 A.L.R.2d 1082, 1118-26 (1959); Annot., 136 A.L.R. 965, 990-95 (1942). *But see* Brandt v. Mansfield Rapid Transit, Inc., 153 Ohio St. 429, 41 Ohio Op. 428, 92 N.E.2d 1 (1950); Annot., 66 A.L.R.2d 1082, 1124-26 (1959); Annot., 136 A.L.R. 965, 994-95 (1942). "It seems universally agreed that an expert medical opinion as to the cause of death, disease, or other physical condition is inadmissible if it is solely an unsupported conclusion of the witness, since however well qualified the witness is, and however scientific or abstruse the subject matter is, an opinion must have reference to the material facts of the case as reflected by the evidence." Annot., 66 A.L.R.2d 1082, 1086 (1959). It is doubtful that the court in *Lockwood* was considering the psychiatrist's testimony as being merely speculative when the ruling on admissibility was made.

[16] Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963) (evidence apparently admissible, but not sufficient to support a verdict); Bullin v. Moore, 256 N.C. 82, 122 S.E.2d 765 (1961) ("I think it is possible to attribute"); Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955) ("might or might not").

[17] See Annot., 135 A.L.R. 516 (1941). In *Lockwood* the court referred to this annotation and summarized its contents thusly:

> (1) It appears to be well settled that expert medical testimony that a given accident or injury *possibly* caused a subsequent impaired physical or mental condition—indicating mere possibility or chance of existence of the causal relation—is not sufficient to establish such relation. . . . (2) There is a division of opinion as to whether expert medical testimony of the probability of such causal relation is sufficient. . . . (3) There are a number of cases, however, which have held that expert medical testimony of *possibility* of such causal relation, in conjunction with non-expert testimony indicating that such relation exists (although not sufficient by itself to establish the relation), is sufficient to establish the causal relation.

262 N.C. at 666, 138 S.E.2d at 544. This would indicate that the court was aware that it was superimposing a rule of sufficiency upon the rule of admissibility, or at least that it was dealing with sufficiency.

[18] Rutherford v. Huntington Coca-Cola Bottling Co., 142 W.Va. 681, 692, 97 S.E.2d 803, 809 (1957).

jurisdictions in varying terms.[19] Apparently the great majority of courts hold that mere scientific possibility of an event causing a particular result is not sufficient to prove the prima facie fact of causation.[20] This note makes no attempt to indicate what is North Carolina's rule as to minimum sufficiency, but *Lockwood* has said that the statement, "it *may* have had an influence on his condition,"[21] is not sufficient. This is reasonable, but now the question arises whether or not the use of the words *could* or *might* would be sufficient. It is difficult to see any logical distinction between *may* and *could* or *might*. Assuming that the court does not try to make this distinction and gives the same effect to *could* or *might* as it does to *may*, North Carolina does have a somewhat ill-defined rule of minimum sufficiency where expert testimony on causation is offered. Why has this rule of sufficiency been superimposed on a rule of admissibility? For the sake of orderly procedure, the court should adopt an admissibility rule that will permit testimony in terms of *could* or *might* and restrict the consideration of reasonable probability for a motion of nonsuit. Nevertheless, the court has said that evidence may not be admissible unless it shows reasonable probability.

II. Could-or-Might Rule and Reasonable Probability Requirement

The *Lockwood* decision brought into clear relief the anomaly that exists between the *could*-or-*might* rule and the reasonable probability requirement. Whether or not the reasonable probability rule be considered a rule of admissibility or one of sufficiency as it relates to causation,[22] it seems that what is required for admissibility may cast doubt on the *sufficiency* of that evidence.[23] In short, what

[19] See Annot., 135 A.L.R. 516 (1941); 20 Am. Jur. *Evidence* § 795 (1939); 32 C.J.S. *Evidence* § 569 (4) b (1964). Without this standard of minimum sufficiency, testimony that expresses any possibility at all would be allowed to go to the jury. For policy reasons there is this realm, usually described as mere scientific possibility, that will not support a verdict for the plaintiff. This writer makes no guess as to when "mere scientific possibility" becomes "reasonable probability." *Lockwood* does not appear to be very illuminating on this point, and it would be dangerous to depend on the facts of that case as a guide.

[20] See notes 17 & 19 *supra*.

[21] 262 N.C. at 666, 138 S.E.2d at 543. (Emphasis added.)

[22] See notes 17 & 19 *supra*.

[23] By requiring that expert testimony be couched in terms of *could* or *might* or *probable*, the evidence automatically becomes suspect under the

is required to get by the *could*-or-*might* rule certainly brings the testimony into the realm where it may be discredited by the reasonable probability rule. It is obvious from the history of the *could*-or-*might* rule that it was intended to restrict expert opinion testimony on causation to the possibility or probability of the event's occurring, and the expert's opinion is directed to the scientific possibility rather than his personal opinion of causation in fact.[24] Supposedly the expert is to go no further because an opinion as to causation in fact is an invasion of the province of the jury.[25] It is also clear that the rule has not had this effect, and doctors, or other experts, are allowed to give their opinion as to causation in fact in terms, less positive than *would* or *did,* that the attorneys think will not run afoul of the rule.[26] This has resulted in a situation where courts do allow opinion evidence as to the ultimate fact of causation; but because attorneys are afraid of the *could*-or-*might* rule, a witness is told to couch his testimony in less positive terms, even though in his expert opinion there is no doubt of the causal connection. It is submitted that the *could*-or-*might* rule has not had the effect of limiting the scope of expert testimony to the scientific probability of causation, but it does have the effect of preventing the jury from hearing the best testimony available, *i.e.,* the precise conviction of the expert as to the fact of causation.

If the policy that the North Carolina court wishes to follow is to prevent opinion testimony on causation in fact, a more adequate rule should be adopted than the *could*-or-*might* rule. If the court does not wish to prevent opinion testimony on causation, then the *could*-or-*might* rule should be abolished altogether. By giving his

reasonable probability rule. There is obviously an area in which the testimony may be in terms of *could* or *might* and show a reasonable scientific probability, but the attorney must be aware that he has both an "upper" and a "lower" limit on the expert opinion testimony that is admissible. He must be careful to negotiate between these two limits. The lower limit of the requirement of reasonable probability as a condition of admissibility was not present prior to *Lockwood,* but by dictum in that case, it suddenly appeared.

[24] See Summerlin v. Carolina & Northwestern R.R., 133 N.C. 550, 45 S.E. 898 (1903); STANSBURY, §§ 126, 137.

[25] See note 24 *supra.*

[26] See, *e.g.,* Hargett v. Jefferson Standard Life Ins. Co., 258 N.C. 10, 128 S.E.2d 26 (1962); Martin v. P. H. Hanes Knitting Co., 189 N.C. 644, 127 S.E. 688 (1925); Moore v. General Accident, Fire & Life Assurance Corp., 173 N.C. 532, 92 S.E. 362 (1917); Lynch v. Rosemary Mfg. Co., 167 N.C. 98, 83 S.E. 6 (1914); Jones v. Warehouse Co., 137 N.C. 337, 49 S.E. 355 (1904).

opinion as to causation, the expert is clearly invading the province of the jury. It is submitted that this is the proper place for "invasion" and if expert testimony is given, it should be given in the language that best describes the opinion, but not in some language that merely allows the testimony to get by an objection based on an outmoded rule of admissibility. The invasion is allowed in the case of an expert because he possesses knowledge and skill above that of the jury.[27] This skill and knowledge is highly useful for the jury in making an accurate determination of the issue before them. If the expert's opinion will assist in making a more accurate determination, it should be admitted.[28] In a situation where an expert has testified only to the scientific possibility of a result following an event, is the jury able to do more than guess whether there was in fact causation? If, however, he continues his testimony and states, in response to a proper hypothetical question, that in his opinion the result was caused by the event, this being based on his expert knowledge, is the jury not better equipped to decide more accurately the matter before them? It is submitted that on the issue of causation as well as in other areas of expert testimony, the doctor should be allowed to give his opinion, and give it in any terms that accurately describe the opinion. In a forceful attack upon the *could*-or-*might* rule, the Iowa court said:

> There is no sound basis in law, reason, or common sense for decisions that a witness may state his opinion as to what "may," "might," "could," or "probably did," cause something, but may not give an opinion as to what "did," "will," or "would," cause it. The true rule is, and should be, that the witness may use such expression as voices his true state of mind on the matter, whether it be possibility, probability, or actuality. To insist that a witness confine his testimony to an expression of possibility or probability, when his real judgment or conviction is actuality, or fact, is unfair, to the witness and the jury, and unjust to the party offering the testimony.[29]

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[27] See, *e.g.*, Seawell v. Brane, 258 N.C. 666, 129 S.E.2d 283 (1963); Tyndall v. Hines Co., 226 N.C. 620, 39 S.E.2d 828 (1946); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942); Hardy v. Dahl, 210 N.C. 530, 187 S.E. 788 (1936); STANSBURY, §§ 132, 134, 135.

[28] See note 27 *supra*.

[29] Grismore v. Consolidated Prod. Co., 232 Iowa 328, 348, 5 N.W.2d 646, 657 (1942). This case has a good discussion attacking the rationale of invasion of the province of the jury. See *id.* at 342-48, 5 N.W.2d at 654-55. It also contains an extensive attack on the *could*-or-*might* rule. See *id.* at 348-60, 5 N.W.2d at 657-663.

III. Practical Considerations

In the light of the *could*-or-*might* rule and the *Lockwood* decision, it appears that an attorney should carefully coach his expert witness so that he will express in the strongest possible terms short of certainty the fact of causation. It would be wise first to ask the doctor if the result in question is a scientific possibility. The favorable and acceptable answer would be that it happens in a high number of instances and the likelihood of such a causal connection is great. The attorney would then ask the doctor's opinion as to the existence of a causal connection on the facts of the case. Again the favorable and acceptable answer would be that in his opinion, in this case, it was very probable that the event did cause the injury. This clearly indicates more than a mere possibility.

It is possible that with the growing disfavor of the *could*-or-*might* rule, an attorney may violate it, raise it squarely on appeal, and have it overruled. It is also possible that a properly framed hypothetical question and answer may fall within an exception.[30] Either course has its obvious risks. An attorney must be aware of the problems that now have come to light as a result of *Lockwood*. In a situation where an expert is necessary to establish causation, the attorney must proceed with caution and take the safest course allowed by the facts of his case, with a full realization of the unsettled and ill-defined rules that exist.

IV. Conclusion

It is submitted that the correct view of the law is that consideration of whether reasonable probability is shown by the expert is to be considered on a motion for nonsuit and not on objection to testimony and a motion to strike. This view would mean that all relevant testimony—not merely the isolated testimony of the expert—is to be considered to determine sufficiency if there is other evidence of causation. It is also strongly urged that the *could*-or-*might* rule, as it is applied, be abolished so that expert opinion testimony be allowed in the terms that best describe the opinion of

[30] See Parrish v. High Point, Randleman, Ashboro & Southern Ry., 146 N.C. 125, 59 S.E. 348 (1907). In *Parrish* the court distinguished *Summerlin* to its own satisfaction. Stansbury finds the distinction a narrow one. See note 3 *supra*. For variations of the *Parrish* exception, see cases cited in note 3 *supra*.

the expert. If, on the other hand, the court wishes to retain the notion that expert witnesses be restricted to giving opinion testimony only of scientific possibilities, a different test must be fashioned.

WILLIAM H. CANNON

Federal Jurisdiction—Non-Federal Ground Rule

The petitioner in *Henry v. Mississippi*[1] was convicted of disorderly conduct. The conviction was based on corroborating evidence which was admittedly obtained by unlawful means and in violation of the state constitution.[2] This evidence constituted an essential ingredient of the state's case, without which the petitioner could not have been connected with the crime. At the trial, counsel for the petitioner failed to object to the introduction of the corroborating evidence,[3] but a motion for a directed verdict was made at the close of the state's case, which among other things specified that the evidence had been illegally obtained.[4] This motion was renewed at the close of all the evidence.[5] Petitioner appealed to the Supreme Court of Mississippi where the decision was initially reversed and the case remanded for a new trial.[6] The court emphasized the plight of out-of-state counsel unfamiliar with the procedural requirement that the objection to illegally seized evidence must be made at the time it is introduced.[7] After the first opinion, the state filed a Suggestion of Error which pointed out that the petitioner had in fact been represented by competent local counsel. The Mississippi Supreme Court then withdrew its first opinion and affirmed the judgment of the trial court.[8] The court stated that honest mistakes of counsel in respect to policy or strategy "are binding upon the client as a part of the hazards of courtroom battle."[9]

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[1] 379 U.S. 443 (1965).

[2] Henry v. State, 154 So. 2d 289, 294 (Miss. 1963).

[3] Furthermore, the officer who was responsible for obtaining the evidence was cross-examined concerning certain facts relating to its seizure. *Ibid.*

[4] For the text of the motion of a directed verdict, see Henry v. Mississippi, 379 U.S. 443, 459-60 (1965) (Harlan, J., dissenting).

[5] *Id.* at 445.

[6] This opinion appeared in the Southern Reporter advance sheets at 154 So. 2d 289 (Miss. 1963). For a criticism of the decision, see 35 MISS. L.J. 109 (1963).

[7] Henry v. State, *supra* note 6, at 296.

[8] This opinion appears in the bound volume of the Southern Reporter; the volume and page number are the same as that of the first opinion. See note 6 *supra*.

[9] Henry v. State, 154 So. 2d 289, 296 (Miss. 1963) (bound volume).